Supreme Court, U.S.
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No. 03-27

In The Supreme Court of the United States

VASKEN TATARIAN,

Petitioner,

vs.

CITY OF ANAHEIM and WILLIAM G. SWEENEY, in his official capacity only as License Collector of the City of Anaheim, and VICTOR J. KALETA, in his official capacity only as Hearing Officer,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Does the holding of this Court in *Montana v. United States*, 440 U.S. 147, 59 L.Ed.2d 210, 99 S.Ct. 970 (1979), that the doctrines of *res judicata* and collateral estoppel bar subsequent litigation involving the same issues, apply to constitutional challenges based upon the First Amendment to a City's Municipal Code?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
SUMMARY OF ARGUMENT	1
STATEMENT OF THE CASE	2
A. Tatarian I	2
B. Revocation Hearings	3
C. Tatarian II	4
STATEMENT OF THE FACTS	5
ARGUMENT	8
THIS COURT SHOULD REJECT THE PETITION BECAUSE THE COURT CORRECTLY CONCLUDED THAT RES JUDICATA IMPOSED UPON PETITIONER AN OBLIGATION TO RAISE IN TATARIAN I ALL LEGAL THEORIES HE COULD HAVE RAISED IN SUPPORT OF HIS CLAIM THAT HIS FIRST AMENDMENT RIGHT TO PRESENT SOB ENTERTAINMENT AT HIS BUSINESS WAS BEING FACIALLY VIOLATED BY CHAPTER 18.89	8
CONCLUSION	13

TABLE OF AUTHORITIES

Page

CASES

Federated Dept. Stores, Inc. v. Moitie, 452 U.S. 394, 69 L.Ed.2d 103, 101 S.Ct. 2424 (1981) 10, 12

Gospel Missions of Am. v. City of L.A., 328 F.3d 548 (9th Cir. 2003) 2, 12, 13

ILGO v. Giulilani, 143 F.3d 638 (2nd Cir. 1998) 4, 7, 9, 10, 11

Monahan v. New York City Dept. of Corrections, 214 F.3d 275 (2d Cir. 2000), *cert. denied*, 531 U.S. 1035, 121 S.Ct. 623 (2000) 10

Montana v. United States, 440 U.S. 147, 59 L.Ed.2d 210, 99 S.Ct. 970 (1979) 11

Reed v. Allen, 286 U.S. 191, 52 S.Ct. 532, 76 L.Ed. 1054 (1932) 10

United States v. Stauffer Chemical Co., 464 U.S. 165, 104 S.Ct. 575, 78 L.Ed.2d 388 (1984) 11

OTHER

Anaheim Municipal Code, §18.89.080.020 6

Anaheim Municipal Code, §18.89.030.050.0520.05 5

Anaheim Municipal Code, Chapter 18.89 ..... *passim*

Ordinance No. 5399 2

U.S. Const., First, Fourth and Fourteenth Amendments 3

SUMMARY OF ARGUMENT

In a rather ordinary application of *res judicata*, both the District Court and the Ninth Circuit found Petitioner was barred from raising different legal theories in support of his second attempt to litigate his facial First Amendment challenges to the City of Anaheim's Sex-Oriented Business Ordinance. As this application of *res judicata* was proper, the petition must be denied.

Starting in 1996, the City of Anaheim warned Petitioner Vasken Tatarian ("Petitioner") that it would be forced to revoke his strip club's permit unless he stopped the repeated violations of the City's Sex-Oriented Business ("SOB") regulations' prohibition against patron/entertainer physical, sexual contact occurring at his club. Faced with potential revocation of his permit, Petitioner sued the City, in part claiming that his First Amendment right to provide SOB entertainment was being facially violated by the City's SOB regulations. (*Vasken Tatarian v. City of Anaheim* SA-CV 96-0280 GLT (EEx) ("*Tatarian, I*"). In *Tatarian I*, Petitioner's complaint asked the District Court to issue injunctive and declaratory relief finding that "Ordinance 18.89 [City's SOB regulations] is constitutionally invalid and should be invalid and unenforceable under the United States Constitution." Rejecting Petitioner's constitutional challenges in toto, the District Court entered judgment against him and for the City on November 17, 1997.

Petitioner's permit was subsequently revoked because he failed to correct the violations which gave rise to *Tatarian I*. In response, Petitioner again sued the City. In the present case ("*Tatarian II*"), Petitioner again argues that his First Amendment right to present SOB entertainment is

being facially violated by the City's SOB ordinance. This time, however, Petitioner has raised different legal theories to support his facial First Amendment claim. In a thoroughly unremarkable application of the *res judicata* doctrine, both the District Court and the Ninth Circuit found that Petitioner's second bite at the apple is barred because he could and should have raised in *Tatarian I* the legal theories he now raises in *Tatarian II* in support of his renewed facial First Amendment challenge. Petitioner subsequently filed his petition seeking to have this Court rewrite the *res judicata* doctrine to allow disappointed litigants to bring successive lawsuits on the same constitutional claim so long as they can create new supporting legal theories.

Petitioner thus asks this Court to announce a new exception to the law of *res judicata*. On May 5, 2003, the Ninth Circuit held that there is no such exception, nor should there be one. *Gospel Missions of Am. v. City of L.A.*, 328 F.3d 548, 556 (9th Cir. 2003).

STATEMENT OF THE CASE

A. Tatarian I

Chapter 18.89 of the Anaheim Municipal Code ("AMC") was first enacted in its current iteration by Ordinance No. 5399 on October 5, 1993.

On September 29, 1994, the City issued Petitioner a Sex Oriented Business permit to operate the Flamingo Theater, an adult nude theater.

On March 21, 1996, Tatarian filed a complaint captioned *Vasken Tatarian v. City of Anaheim*, Case No. SA-CV-96-280

GLT (EEx) (*"Tatarian I"*). In that complaint, Tatarian challenged the constitutionality of Anaheim Municipal Code Chapter 18.89, both facially and as applied, alleging that Chapter 18.89 violated his First, Fourth, and Fourteenth Amendment rights.

On November 3, 1997, the Honorable Gary Taylor issued an Order granting the City's Motion for Summary Judgment rejecting all of Tatarian's Constitutional attacks on Chapter 18.89. Petitioner did NOT appeal this ruling.

B. Revocation Hearings

Petitioner's violations of the City's SOB Ordinance started in 1996 when "entertainers" for the Flamingo Theater, violated the prohibition against patron/entertainer sexual physical contact.

On August 13, 1998 a letter was sent from the City License Collector to Petitioner re Revocation of his Sex-Oriented Business Permit at 618 E. Ball Road in Anaheim due to these violations.

On January 14, 1999, Hearing Officer Victor J. Kaleta issued his Findings of Fact and Decisions on the Revocation and on the Denial of Renewal of the Sex-Oriented Business permit of the Flamingo Theater. The Hearing Officer issued a thorough, single spaced, 25-page decision chronicling the overwhelming evidence supporting his finding that Petitioner's regular and substantial violations of the City's Sex-Oriented Business ordinance required revocation and nonrenewal of his permit. The Hearing Officer listed the specific violations of the prohibition against patron/entertainer sexual physical contact that

occurred at the strip club in the applicable 12 month period.

C. Tatarian II

On April 13, 1999, Petitioner filed his complaint against the City of Anaheim in this case.

After numerous law and motion matters, on April 28, 2000, the City filed a Motion for Partial Summary Judgment on the grounds that Petitioner's First Amended Complaint is barred by the doctrine of *res judicata* from claiming that Chapter 18.89 of the Anaheim Municipal Code is facially unconstitutional and that the City is entitled to partial summary judgment as a matter of law on numerous claims for relief because a judgment was rendered against Petitioner on his constitutional challenges to Chapter 18.89 by the District Court in *Tatarian I*.

On August 17, 2000, the District Court issued its well reasoned Order granting the City's Motion for Partial Summary Judgment as to numerous claims. The District Court followed *ILGO v. Giuliani*, 143 F.3d 643, 646 (2nd Cir. 1998) which held that for purposes of *res judicata* analysis, a a statute's facial unconstitutionality under the First Amendment presents a single, unitary cause of action.

On July 23, 2001, the District Court filed a Stipulation and Order Dismissing all Remaining Claims. Judgment was entered on August 6, 2001. On September 4, 2001, Tatarian timely filed a Notice of Appeal. On January 30, 2003, the Ninth Circuit affirmed.

STATEMENT OF THE FACTS

On October 5, 1993, the City adopted Ordinance No. 5399, enacting a new SOB zoning ordinance for the City as Chapter 18.89.

On September 29, 1994, and pursuant to Chapter 18.89, the City granted Petitioner's application to operate a live, nude, SOB known as the "Flamingo Theater." Soon afterward, the City discovered that Petitioner was violating several provisions of both Chapter 18.89 and his permit.

Aside from violating a whole host of other laws, Petitioner's conduct violated AMC §18.89.030.050.0520.05 that states:

> "No entertainer shall have physical contact with any patron, and no patron shall have physical contact with any entertainer, while on the premises [of the SOB], which physical contact involves the touching of the clothed or unclothed genitals, pubic area, buttocks, cleft of the buttocks, perineum, anal region, or the female breast with any part or area of such other person's body."

Due to Petitioner's violations of Chapter 18.89, the City informed Petitioner that unless the violations were stopped, the City would revoke and/or not renew his permit.

Apprehensive about the City either refusing to renew his permit and/or revoking his permit, on March 21, 1996, Petitioner filed *Tatarian I* against the City seeking to invalidate ***all*** of Chapter 18.89. In *Tatarian I*, as in this case, Petitioner argued that his First Amendment right to present SOB entertainment was being facially violated by Chapter 18.89.

On November 4, 1997, the Honorable Gary L. Taylor entered his Order granting summary judgment for the City and upholding Chapter 18.89 as constitutional. The District Court entered Judgment for the City on November 17, 1997. Petitioner did NOT appeal.

Between July of 1997 and 1998, police officers inspected Petitioner's establishment. Each time the police were present, save one occasion, they observed violations of Chapter 18.89. For instance, the police observed at least eleven (11) incidents of Petitioner's nude entertainers having "physical contact" with Petitioner's patrons. Notably, these were the same violations which caused the City to warn of revocation of Petitioner's permit under AMC §18.89.080.020 and which gave rise to his facial First Amendment challenge in *Tatarian I*. Several incidents were videotaped.

Having failed to correct the code violations, the Petitioner's pre-*Tatarian I* fears materialized, i.e., the City commenced the revocation and non-renewal of his permit. Two days of hearings were held on the revocation. On January 14, 1999, after considering the substantial evidence introduced during the hearings, and the briefs both parties subsequently filed, the hearing officer issued a thorough, 25-page decision finding that overwhelming evidence supported the decision to revoke and not renew Petitioner's permit.

Obviously dissatisfied with this outcome, Petitioner, on April 13, 1999, commenced *Tatarian II* by filing his complaint. Variously denominated as requests for issuance of writs of mandate, requests for declaratory relief, and requests for injunctive relief, most of Petitioner's claims

again consisted of facial First Amendment challenges to the constitutionality of Chapter 18.89.

Petitioner chose to split his facial First Amendment claim between *Tatarian I* and *II*. For this reason, on April 28, 2000, the City filed a Motion For Partial Summary Judgment demonstrating that *res judicata* barred Petitioner from litigating those legal theories he could and should have raised in *Tatarian I*. On August 17, 2000, the District Court issued an Order granting the City's Motion For Partial Summary Judgment on several "causes of action". The District Court followed *ILGO v. Giuliani*, 143 F.3d 643, 646 (2nd Cir. 1998) which held that for purposes of *res judicata* analysis, a statute's facial unconstitutionality under the First Amendment presents a single, unitary cause of action. The Ninth Circuit affirmed this ruling.

This Petition must be denied because Petitioner has not established that an exception should be created to the application of *res judicata* in this case.

ARGUMENT

THIS COURT SHOULD REJECT THE PETITION BECAUSE THE COURT CORRECTLY CONCLUDED THAT *RES JUDICATA* IMPOSED UPON PETITIONER AN OBLIGATION TO RAISE IN *TATARIAN I* ALL LEGAL THEORIES HE COULD HAVE RAISED IN SUPPORT OF HIS CLAIM THAT HIS FIRST AMENDMENT RIGHT TO PRESENT SOB ENTERTAINMENT AT HIS BUSINESS WAS BEING FACIALLY VIOLATED BY CHAPTER 18.89.

Given that the Ninth Circuit's opinion represents an ordinary, textbook application of *res judicata*, granting the Petition is hardly appropriate. It is clear that the "rights" established in *Tatarian I* would be destroyed or impaired by Petitioner's prosecution of those legal theories the Court determined *res judicata* barred in *Tatarian II*. In *Tatarian I*, Petitioner alleged that his First Amendment right to present SOB entertainment was being facially violated by the City's SOB ordinance. The Order and Judgment entered in favor of the City in *Tatarian I* concluded that Chapter 18.89 *did not* facially violated Petitioner's First Amendment rights. This conclusion would be greatly impaired by the prosecution of barred legal theories in *Tatarian II*. No longer could the City rely on the *Tatarian I* court's conclusion that the SOB regulations being applied to Petitioner's business did not facially violate his First Amendment right to present SOB entertainment. By prevailing in *Tatarian I*, the City established its right to continue to regulate Petitioner's business with the regulations applicable to him during *Tatarian I*. Such a right would be impaired if in this case, Petitioner were again allowed to claim that other previously applicable provisions of the regulations facially violate his First

Amendment right to present SOB entertainment. Such a result would run afoul of the primary policy supporting *res judicata* articulated by this Court:

> "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest; and that matters once tried shall be considered forever settled as between the parties." *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 402, 69 L.Ed.2d 103, 101 S.Ct. 2424, 2429 (1981).

Petitioner's belated attempt to narrow the "rights" determined by *Tatarian I* to only three issues must be rejected. It was, after all, Petitioner that filed the Complaint in *Tatarian I*.

This case is substantially similar to *ILGO v. Giulani*, 143 F.3d 638 (2nd Cir. 1998). There, the Court of Appeal dismissed that portion of plaintiff ILGO's second federal lawsuit claiming that New York City's parade permit requirements facially violated its First Amendment rights. The court concluded that *res judicata* barred ILGO from litigating its facial First Amendment challenge to the parade permit requirement because it raised and lost that claim in its prior suit.

In *ILGO*, the court concluded that the two lawsuits did involve the same "claim": they both argued the same regulatory scheme facially violates the plaintiff's First Amendment right to participate in the parade. *Id.* at 644. Moreover, *ILGO* is also particularly relevant here because the court concluded the addition of new legal arguments to support the claim in the second suit will not stave off *res judicata*. *Id.* at 646 ["To the extent that any aspect of ILGO's facial challenge brought in 1996 differs from that

which it raised in 1995, the District Court correctly held that the claims are barred by the doctrine of *res judicata* because they could have been raised in the earlier proceeding."] *ILGO* has been recently followed. "*[R]es judicata* can act as a bar to virtually any sort of claim, including constitutional challenges to the facial validity of municipal regulations." *Monahan v. New York City Dept. of Corrections*, 214 F.3d 275, 290 (2d Cir. 2000), *cert. denied*, 531 U.S. 1035, 121 S.Ct. 623 (2000).

Here, Petitioner's facial First Amendment challenge to Chapter 18.89 is barred for the same reason the plaintiffs' facial First Amendment challenge to the permit ordinance was barred in *ILGO*.

Petitioner, however, fails to provide any relevant authority for the proposition that this Court should ignore the application of *res judicata* simply because it results in him being barred from raising different legal theories to support the facial constitutional challenge he raised in an earlier lawsuit. In fact, this Court has unequivocally rejected such an "equitable exception" to *res judicata*. In *Federated Dept. Stores Inc. v. Moitie*, supra, this Court explained that even the interests of individual justice in a particular case do not warrant crafting exception to long standing doctrine of *res judicata*. Citing *Reed v. Allen*, 286 U.S. 191, 52 S.Ct. 532, 76 L.Ed. 1054 (1932) this Court stated:

> "The predicament in which respondent finds himself is of his own making . . . [W]e cannot be expected, for his sole relief, to upset the general and well established doctrine of *res judicata*, conceived in the light of the maxim that the interests of the state requires that there be an end to litigation . . . a maxim which comports with

> common sense as well as public policy. And the mischief which would follow the establishment of precedent for so disregarding this salutary doctrine against prolonging strife would be greater than the benefit which would result from relieving some case of individual hardship." *Federated Dept. Stores Inc. v. Moitie*, supra, 452 U.S. at 401-402.

Moreover, Petitioner's argument appears to presume that the application of *res judicata* to him has some undisclosed conclusive effect on the public regarding the constitutionality of the challenged ordinance. Petitioner's argument, however, ignores the fact the *res judicata* only bars parties and their privies. Any other member of the public having standing to facially challenge the First Amendment implications of Chapter 18.89 is presumably free to do so. Accordingly, the public is not deprived of the opportunity to right a constitutional wrong should one exist. *ILGO*, supra, 143 F3d 638, 647.

This Court most recently addressed the proper scope of the *Montana v. United States*, 440 U.S. 147, 59 L.Ed.2d 210, 99 S.Ct. 970 (1979), "exception" in *United States v. Stauffer Chemical Co.*, 464 U.S. 165, 104 S.Ct. 575, 78 L.Ed.2d 388 (1984), which involved successive actions brought by the EPA against Stauffer in response to the company's refusal to submit to inspections by private contractors hired by the EPA. This Court expressed serious doubt regarding the proper scope of the exception:

> "While our discussion in *Montana* indicates that the exception is generally recognized, we are frank to admit uncertainty as to its application. The exception seems to require a determination as to whether an 'issue of fact' or an 'issue of law' is sought to be relitigated and then a determination as to whether the 'issue of law' arises in a

> successive case that is so unrelated to the prior case that relitigation of the issue is warranted. Yet we agree that, for the purpose of determining when to apply an estoppel, when the claims in two separate actions between the same parties are the same or are closely related it is not ordinarily necessary to characterize an issue as one of fact or of law for purposes of issue preclusion. In such a case, it is unfair to the winning party and an unnecessary burden on the courts to allow repeated litigation of the same issue in what is essentially the same controversy, even if the issue is regarded as one of 'law.'" *Id.* at 171, 104 S.Ct. at 579 (internal quotation marks and citations omitted).

Petitioner asks this Court to announce a new exception to *res judicata* when the claim involves a statute's unconstitutionality. On May 5, 2003, the Ninth Circuit held that there is no such exception, nor should there be one. *Gospel Missions of Am. v. City of L.A.*, 328 F.3d 548, 556 (9th Cir. 2003). The City's SOB Ordinance is not immunized from constitutional scrutiny; claim preclusion does not bar this claim from being raised by a non-party to *Tatarian I*. As far as the justice or the public policy of denying Petitioner his claim, this Court has emphasized, "There is simply no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of res judicata." *Federated Dep't Stores, Inc. v. Moitie*, supra, 452 U.S. at 401 (citation omitted).

The Ninth Circuit's ruling is a rather mundane application of *res judicata* principles. Simply stated, the Ninth Circuit's ruling only bars Petitioner from asserting new legal theories in *Tatarian II* which he could have argued in *Tatarian I* in support of his claim that his First

Amendment right to provide SOB entertainment was being facially violated by the City's SOB regulations.

CONCLUSION

Petitioner made allegations that his First Amendment right to provide sexually oriented entertainment at his business was being facially violated by the City's Sex-Oriented Business regulations in his *Tatarian I* complaint. Accordingly, in his prayer for relief, Petitioner requested the District Court to issue injunctive and declaratory relief finding that "Ordinance 18.89 is constitutionally invalid and should be invalid and unenforceable under the United States Constitution."

There can be no doubt that in both *Tatarian I* and *Tatarian II* Petitioner raised the same facial First Amendment Claim: That Petitioner's First Amendment right to present sexually oriented entertainment at his business was facially violated by the City's Sex-Oriented Business regulations.

In this case the Ninth Circuit found Petitioner was barred from raising different legal theories in support of his second attempt to litigate his facial challenge. As this application of *res judicata* by the Ninth Circuit was proper, this Petition must be denied.

Petitioner asks this Court to announce a new exception to *res judicata*. On May 5, 2003, the Ninth Circuit held that there is no such exception, nor should there be one. *Gospel Missions of Am. v. City of L.A.*, 328 F.3d 548,

556 (9th Cir. 2003). One should not be created now. To do so would open a floodgate of litigation for the courts.

DATED: August 1, 2003

Respectfully submitted,

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